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In The

Supreme Court of the United States

MICHAEL SPIELVOGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER SPIELVOGEL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY (A) THE FAILURE OF ATTORNEY BRODERSEN (i) TO OBTAIN A TRANSCRIPT OF THE HEARING BEFORE THE MAGISTRATE JUDGE AND (ii) TO REQUIRE THE DISTRICT COURT CONDUCT A *DE NOVO* REVIEW OF THE PROCEEDING BEFORE THE MAGISTRATE, (B) ATTORNEY BRODERSEN'S FAILURE TO ARGUE AT TRIAL THAT THE GOVERNMENT HAD OPENED THE DOOR TO THE ADMISSION OF DR. CADDY'S TESTIMONY BY THE GOVERNMENT'S IMPROPER CROSS EXAMINATION OF SPIELVOGEL ON MATTERS RELATING TO DR. CADDY, (C) ATTORNEY BRODERSEN'S FAILURE (i) TO PRESENT THE COURT OF APPEALS WITH A COMPLETE RECORD, INCLUDING THE TRANSCRIPT OF THE MAGISTRATE'S HEARING ON THE ADMISSIBILITY OF DR. CADDY'S TESTIMONY, PREVENTING THE COURT OF APPEALS FROM PROPERLY DECIDING THE ISSUE OF THE ADMISSIBILITY OF DR. CADDY'S TESTIMONY ON APPEAL, AND (ii) HIS FAILURE TO ARGUE THAT THE GOVERNMENT HAD OPENED THE DOOR TO THE TESTIMONY OF DR. CADDY, EVEN IF IT WERE OTHERWISE INADMISSIBLE, AND (D) BRODERSEN'S FAILURE TO PRESENT EFFECTIVE ARGUMENT TO THE COURT OF APPEALS TO ESTABLISH THAT THE

QUESTIONS PRESENTED – Continued

DISTRICT COURT ERRED IN EXCLUDING DR. CADDY'S TESTIMONY ON THE FACTS OF THIS CASE.

II. **WHETHER *DE NOVO* REVIEW OF THE RECORD OF A MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A CRIMINAL CASE ON THE QUESTION OF THE ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL IS CONSTITUTIONALLY MANDATED AND REQUIRES THE DISTRICT COURT TO REVIEW A TRANSCRIPT OF AN EVIDENTIARY HEARING CONDUCTED BY THE MAGISTRATE JUDGE, WHICH WAS THE BASIS FOR THE MAGISTRATE'S RECOMMENDATION.**

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, MICHAEL SPIELVOGEL, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability in this case.

OPINION AND ORDERS BELOW

The United States District Court for the Middle District of Florida denied Spielvogel's petition filed under 28 U.S.C. § 2255 by opinion and order entered on July 15, 2008, and denied a certificate of appealability by order entered on October 8, 2008, copies of which are included in the attached Appendix, and the United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability by order entered January 9, 2009. A copy of that order is also included in the attached appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 141 L.Ed.2d 242, 66 U.S.L.W. 4489 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law;

2. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Article III, § 1, of the United States Constitution provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

> which shall not be diminished during their Continuance in Office.

STATEMENT OF THE CASE

This petition seeks review of an order of the Eleventh Circuit Court of Appeals denying Michael Spielvogel ("Spielvogel") a certificate of appealability upon the denial of his petition for relief under 28 U.S.C. § 2255.

Spielvogel was represented at trial and on his first and second appeals by attorney Daniel N. Brodersen ("Brodersen") of Orlando, Florida. Brodersen retained on behalf of Spielvogel Dr. Glenn Caddy, a forensic psychiatrist, as an expert witness to assist the defense, and notice was given the government of Spielvogel's intent to present expert testimony from Dr. Caddy. This prompted the government to file a motion *in limine* to exclude Dr. Caddy's testimony based on the restrictions created by the Insanity Defense Reform Act.

The Insanity Defense Reform Act ("IDRA"), 18 U.S.C. § 17, sets certain restrictions on expert testimony; it prohibits an expert from giving an opinion on the ultimate issue of insanity, when the defense of insanity is at issue.

> The Act does not, however, completely eliminate the use of mental disease or defect evidence outside of attempts to establish the affirmative defense of insanity. The Act does

> not, by its terms, prohibit psychiatric evidence relevant to issues other than excuse or justification of otherwise criminal conduct. If a subjective state of mind is an element of a crime, evidence regarding the existence or absence of that state of mind is evidence relevant to whether a crime was in fact committed. Psychiatric evidence which negates *mens rea* thus negates an element of the offense rather than constituting a justification or excuse. *United States v. Cameron*, 907 F.2d 1051, 1065 (11th Cir.1990). The plain language of the Act, as well as its legislative history, indicates that Congress did not intend to exclude psychiatric evidence which negates the mens rea element of a charged crime. Id. at 1064-65. Thus, in *Cameron*, this court held that the Insanity Defense Reform Act does not bar the admission of psychiatric evidence to negate *mens rea*. Id. at 1062.

United States v. Westcott, 83 F.3d 1354, 1358 (11th Cir.1996).

The motion was referred to the Magistrate Judge for an evidentiary hearing. Dr. Caddy testified at length at the evidentiary hearing before the Magistrate Judge, following which the Magistrate Judge issued a Report & Recommendation ("R&R") recommending to the District Judge that the motion *in limine* be granted.

Brodersen never ordered a transcript of the evidentiary hearing. A reasonably competent counsel would have known to do so. The District Judge never

obtained a transcript of the proceeding before the Magistrate Judge before the District Judge ruled on the R&R. It is our position that the District Judge could not engage in the required *de novo* review of the R&R without a transcript of the testimony presented to the Magistrate Judge. The District Judge adopted the R&R and granted the government's motion *in limine* excluding the testimony of Dr. Caddy.

Brodersen never objected to the District Judge deciding this evidentiary issue in this manner – that is, without according Spielvogel *de novo* review.

At trial Brodersen sought to have the District Judge revisit the issue. Dr. Caddy was available and prepared to testify in Spielvogel's defense. Again the District Judge ratified his prior ruling after perfunctory discussion and without Brodersen objecting to the decision being made without reference to the transcript of the evidentiary hearing.

Once the government was assured that Dr. Caddy could not be used in defense, the Assistant United States Attorney who tried the case for the government proceeded to make Dr. Caddy's *absence* – the very absence which was engineered by the government – a feature of the trial, improperly cross examining Spielvogel at length about his attempted recourse to Dr. Caddy. The defense sometimes objected and sometimes did not object to this line of questioning, which objections, when made, were improperly overruled. To the extent Brodersen did not sufficiently argue that the government had opened

the door to the admission of the testimony of Dr. Caddy by its improper cross examination of Spielvogel, by timely and specific objection and statement of grounds on each such occasion, it is Spielvogel's position that Brodersen rendered ineffective assistance of counsel.

Brodersen did not ask the District Judge to revisit his prior evidentiary ruling in light of the government opening the door to the testimony of Dr. Caddy by its improper cross examination of Spielvogel concerning the missing Dr. Caddy. In closing argument the government improperly argued for conviction based on the government's line of cross examination of Spielvogel on the missing Dr. Caddy. This was not objected to by Brodersen, nor did Brodersen move for mistrial on this basis. He should have done so.

Brodersen continued to represent Spielvogel on the first direct appeal. Brodersen again failed to order a transcript of the Magistrate Judge's evidentiary hearing on the motion *in limine* to include it in the record on appeal.

Brodersen's initial appeal brief included only a perfunctory challenge to the exclusion of Dr. Caddy's testimony. The argument was presented in less than one page of text in the brief. Lacking in record references for its factual assertions, and perfunctory in content, the argument was not sufficient to meet the Eleventh Circuit's standard for preservation, and was summarily disposed of in a footnote to the

Eleventh Circuit's published decision. Footnote ten of that decision reads:

> Spielvogel also contends that he should have been allowed to introduce evidence of his diminished capacity to negate his mens rea. Spielvogel offered the testimony of Dr. Glenn Ross Caddy, a forensic psychologist, to show that Spielvogel suffered from a personality disorder that made him easily intimidated. However, even if Spielvogel was truly afraid after his conversations with Cretul, this fear in no way shows that Spielvogel did not intend to lie when he made up details about Cretul's threats and reported them to the FBI and in his affidavit. The district court, then, did not abuse its discretion by barring Caddy's testimony. See *United States v. Cameron*, 907 F.2d 1051, 1067 (11th Cir.1990).

United States v. Pendergraft, 297 F.3d 1198, 1212, n.10 (11th Cir.2002).

Brodersen's argument was woefully deficient; it failed to include any record citation to the evidentiary hearing transcript, because counsel had not insured that a transcript was prepared and made part of the record on appeal; it failed to raise any objection to the District Court deciding this issue without conducting a *de novo* redetermination by review of the transcript; it failed to contain any record citation to the government's cross examination and closing argument in which the government made the absence of Dr. Caddy a feature of the trial and which opened the

door to the admission of Dr. Caddy's testimony, even had the motion *in limine* otherwise been properly denied. A reasonably competent appellate counsel would have done so, because had this argument been properly preserved and presented on a proper and complete record, Spielvogel would have been entitled to relief, that is, to the admission of the testimony of Dr. Caddy, and the exclusion of that testimony, especially in light of the improper cross examination of Spielvogel, would have made a difference in the outcome of the trial, or appeal, that is, this Court cannot be confident that the outcome would have been the same but for the complained of errors.

Spielvogel's counsel was ineffective at trial and on appeal for the reasons set forth above. A reasonably competent criminal defense attorney at trial and on appeal would not have failed to order a transcript of the evidentiary hearing to prepare and preserve the record for *de novo* review by the District Judge and appellate review by the Eleventh Circuit, would not have failed to object to the District Judge deciding the evidentiary motion by adopting an R&R without conducting the *de novo* review that is constitutionally mandated in such circumstances, would not have failed to consistently object to every instance of the government improperly cross examining Spielvogel on Dr. Caddy, would not have failed to ask the District Judge to permit Dr. Caddy to testify after the government opened the door to the testimony on cross examination, would not have failed to move for a mistrial upon such cross examination, would not

have failed to object to the closing argument based on Dr. Caddy, and would have thoroughly argued all of these issues on appeal, upon a complete record, including the missing transcript of the evidentiary hearing, and with complete record citations to the government's improper use of Dr. Caddy on cross examination and in closing argument. Had this been done, this Court cannot be confident beyond a reasonable doubt that the outcome would have been the same at trial or on appeal if appeal had been necessary.

Spielvogel attempted to raise this argument in his belated appeal but was denied relief based on the Eleventh Circuit's decision that the decision in the first appeal was law of the case *for direct appeal purposes*.

> Spielvogel also contends that the district court abused its discretion in excluding the testimony of Dr. Caddy. His counsel made this argument – which related to all the counts – in his first appeal. We addressed it on the merits in Spielvogel I. The law of the case forecloses its presentation here.

United States v. Spielvogel, ___ Fed.Appx. ___, 2008 WL 324165 (11th Cir.2008).

Spielvogel then returned to the District Court with a petition under 28 U.S.C. § 2255 raising the instant claims of ineffective assistance of counsel and arguing that the District Court was required to have obtained and reviewed a transcript of the evidentiary

hearing before the Magistrate in order to fulfill its constitutionally mandated *de novo* review. The District Court summarily denied relief and denied a certificate of appealability. The Eleventh Circuit Court of Appeal similarly denied a certificate of appealability and that is the posture of the case at this time; Spielvogel argues that he is entitled to a certificate of appealablity on these issues.

REASONS FOR GRANTING THE WRIT

I. WHETHER SPIELVOGEL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY (A) THE FAILURE OF ATTORNEY BRODERSEN (i) TO OBTAIN A TRANSCRIPT OF THE HEARING BEFORE THE MAGISTRATE JUDGE AND (ii) TO REQUIRE THE DISTRICT COURT CONDUCT A *DE NOVO* REVIEW OF THE PROCEEDING BEFORE THE MAGISTRATE, (B) ATTORNEY BRODERSEN'S FAILURE TO ARGUE AT TRIAL THAT THE GOVERNMENT HAD OPENED THE DOOR TO THE ADMISSION OF DR. CADDY'S TESTIMONY BY THE GOVERNMENT'S IMPROPER CROSS EXAMINATION OF SPIELVOGEL ON MATTERS RELATING TO DR. CADDY, (C) ATTORNEY BRODERSEN'S FAILURE (i) TO PRESENT THE COURT OF APPEALS WITH A COMPLETE RECORD, INCLUDING THE TRANSCRIPT OF THE MAGISTRATE'S

HEARING ON THE ADMISSIBILITY OF DR. CADDY'S TESTIMONY, PREVENTING THE COURT OF APPEALS FROM PROPERLY DECIDING THE ISSUE OF THE ADMISSIBILITY OF DR. CADDY'S TESTIMONY ON APPEAL, AND (ii) HIS FAILURE TO ARGUE THAT THE GOVERNMENT HAD OPENED THE DOOR TO THE TESTIMONY OF DR. CADDY, EVEN IF IT WERE OTHERWISE INADMISSIBLE, AND (D) BRODERSEN'S FAILURE TO PRESENT EFFECTIVE ARGUMENT TO THE COURT OF APPEALS TO ESTABLISH THAT THE DISTRICT COURT ERRED IN EXCLUDING DR. CADDY'S TESTIMONY ON THE FACTS OF THIS CASE.

The district court adopted a contested Report and Recommendation from a Magistrate Judge who had taken 57 pages of proffered psychological testimony from the proposed defense expert witness, Dr. Glenn Caddy, who would have testified about Spielvogel's state of mind at the time of the offenses and how that negated specific intent. The district judge adopted the R&R without having the benefit of a transcript of the hearing.

At trial the district court revisited the ruling and elaborated on it citing four grounds to exclude the testimony, each of which was error:

(1) The Court's reliance upon the R&R without ever reviewing the record of that hearing, was constitutionally deficient;

(2) That there had been no notice of an insanity defense was irrelevant because the defense had provided timely notice of its intended expert testimony, and stated it did not intend to rely upon an insanity defense, therefore no notice of intent to rely upon insanity defense was required;

(3) The Court's opinion that Fed.R.Evid. 704(b) prohibited the testimony was simply wrong, because Rule 704(b) permits expert testimony tending to negate specific intent; and

(4) That the government had not been provided adequate notice under Fed.R.Crim.P. 16 was wrong, because the government had been provided a copy of Dr. Caddy's report prior to the preliminary hearing on admissibility and the government itself filed the report with the Court prior to the magistrate's hearing. [9/8/2000 TR - 14; 20; Docket 42; Docket 34]

Because this evidence constituted Spielvogel's only defense to the charges – that he had made false or incorrect statements but not with criminal intent – its exclusion denied Spielvogel Due Process and constituted reversible error.

It was ineffective assistance of counsel on the part of Brodersen to not properly preserve and present this argument at trial and on appeal, and had he done so, this Court cannot be confident beyond a reasonable doubt that the outcome of the trial or appeal would have been the same.

II. ARGUMENTS BRODERSEN SHOULD HAVE PRESERVED AND PRESENTED AT TRIAL AND ON APPEAL.

A. THE DISTRICT COURT ERRED IN PROHIBITING SPIELVOGEL FROM PRESENTING EXPERT PSYCHIATRIC TESTIMONY TO NEGATE SPECIFIC INTENT.

The admissibility of the psychiatric testimony was governed by *United States v. Cameron*, 907 F.2d 1051 (11th Cir.1990). Senior Circuit Judge Hill, writing for the panel in *Cameron*, held:

> The government argues that the Insanity Defense Reform Act of 1984, Pub.L. No. 98-473, Title II, § 402(a), 98 Stat. 2057, § 20, *recodified at* 18 U.S.C. § 17, prohibited the admission of psychiatric evidence offered to negate an element of the crime, and limits the use of such evidence to the jury's consideration of a defendant's legal sanity (and only when the defendant complies with all the procedural requirements of raising such a defense).
>
> *We disagree, and hold that while Congress clearly meant to circumscribe carefully the use of psychiatric evidence both as it relates to legal excuse and to legal guilt or innocence, Congress did not bar the use of psychiatric evidence to negate specific intent when such is an element of the offense charged.*

Cameron, 907 F.2d at 1060 (emphasis supplied).

Spielvogel was charged in count four with perjury in violation of 18 U.S.C. § 1623 and in count five with false statements in violation of 18 U.S.C. § 1001. Both are specific intent crimes. *See* ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, Offense Instruction 32 and Offense Instruction 50. Spielvogel put the government on notice of his intent to present psychiatric testimony by Dr. Glenn Ross Caddy on Spielvogel's statement of mind and his ability to form the specific intent to commit the charged crimes. [27-9] In response the government filed a motion *in limine* to exclude the testimony [27], and an evidentiary hearing was conducted before the Magistrate Judge prior to trial. [43]

At that evidentiary hearing, Dr. Caddy testified that due to Spielvogel's diagnosed mental condition he "loses his sense of truth" [9/8/2000 TR - 45] Dr. Caddy expressly testified at the pretrial hearing that "it would not be appropriate to use insanity as a claim here." [9/8/2000 TR - 45] The government asked Dr. Caddy on cross examination in the pretrial hearing:

> Q Are you claiming, in other words, those delusions made him insane?
>
> A No. I am not trying to get into insanity through the back door with this witness [*sic*]. What I am saying is that he was operating under the beliefs that other people did not share. That belief system was being driven by irrational fear that ultimately met a standard of paranoia . . .

[9/8/2000 TR - 67]

Q When you said that he was subject to paranoid delusion you did not mean to the extent that he was unable to understand the difference between right and wrong?

A No, I did not mean that.

Q You also stated that Mr. Spielvogel has trouble finding the truth and loses the sense of truth. You did not again by that statement mean that Mr. Spielvogel would not know the difference between right and wrong?

A No, I did not mean that.

Q I wanted to clarify that. You are not in any way indicating that any of these conditions would have led Mr. Spielvogel to not know truth from falsity or to know when he was telling a lie that that was a lie.

A I would agree that I would not support either of those positions . . .

[9/8/2000 TR - 68]

Q Is it your testimony that this personality disorder makes it impossible for Mr. Spielvogel to lie?

A To lie?

Q Yes?

A Or to tell the truth?

Q Yes.

A No, no, *I think Mr. Spielvogel routinely lies. I think he has actually gotten to the point*

> *where he has been able to justify impression management to the point where it blends in and after a period of time the barrier between truthfulness and deception gets lost because it is an unconscious process . . .*

[9/8/2000 TR - 70-71]

> Q Again, the personality problem he has which makes it manipulative would not mean that he could not decide to manipulate through deceit?
>
> A Yes, I will never sit here and say it is not. It is impossible for Michael and probably almost anybody else, to not make a conscious decision not to be dishonest. *But what I am saying is that some of his fantasy, some of his dishonesty, he doesn't perceive as dishonest because it blends so much with what he is trying to do.*

[9/8/2000 TR - 72]

At this point in the proceeding counsel for Spielvogel interrupted to remind the government and Court that:

> [DEFENSE COUNSEL] [T]he issue is Dr. Caddy's diagnosis of Michael Spielvogel such that it could allow a jury to find it negates *mens rea* . . . But you don't have to make a finding that it does not [*sic*] negate intent but does the reasonable jury –
>
> [THE COURT] I think I disagree with you on that.

[9/8/2000 TR - 74]

The Magistrate Judge issued a Report & Recommendation ("R&R") four days after the hearing recommending that the government's motion to exclude Dr. Caddy's testimony be granted. [44] The defense filed a timely written objection to the R&R arguing that Dr. Caddy's testimony at the hearing was admissible under the governing standard presented in *Cameron* and *United States v. Westcott*, 83 F.3d 1354, 1358 (11th Cir.1996):

> [E]vidence in the form of testimony of a qualified psychologist who has examined the defendant is admissible where it focuses on the defendant's specific intent at the time the offense was committed and not on behavior or disorders which simply provide excuse or justification for the conduct alleged to be criminal. . . . With all due respect to Judge Jones, Spielvogel asserts that Dr. Caddy's proffered testimony satisfies the dictates of Eleventh Circuit precedent at least in the context of a pre-trial determination of its admissibility . . .

[49-3]

Without ordering a transcript of the evidentiary hearing, the District Judge adopted the R&R.[1] [52]

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[1] Fed.R.Civ.P. 72 provides that in *civil* cases that the objecting party is to order the transcript, but there is no comparable criminal rule, and in counsel's experience transcripts are automatically prepared after all evidentiary hearings in criminal cases referred to Magistrate Judges.

The district court erred in adopting the R&R which Spielvogel had objected to, without reviewing a transcript of the evidentiary hearing. The R&R itself stated that it was recommending that the evidence be excluded "for the reasons explained in open court . . . " as well as the reasons set forth in the R&R. The question was whether the proffered testimony was admissible or not. This issue could not be determined under the required *de novo* review standard, without the district court reading the record to see what the testimony was.

Had the district court reviewed the record, it would have concluded that the testimony in fact was admissible under the Insanity Defense Reform Act as applied by the Eleventh Circuit in *Cameron* and *Westcott*.

Spielvogel affirmatively proffered extensive testimony – 57 pages of transcript – from his proposed expert witness, none of which the district judge read before adopting the R&R excluding it. The proffered testimony was not simply a statement that Spielvogel suffered from a mental condition, but rather a detailed explanation of how, due to his mental condition and paranoia, he exaggerated fears (and at issue was his sense that he had been threatened and whether he was being truthful when he reported being threatened) and that his mental condition was such that he often and readily lost the sense of truth.

This testimony went directly to negating specific intent, was clearly articulated and was admissible for that purpose.

Cameron stated in *dicta*:

> When a defendant claims to have psychiatric evidence that she "lacked the capacity" or was "incapable" of forming the intent necessary for the crime charged, most often that defendant is speaking of an incapacity to reflect or control the behaviors that produced the criminal conduct. Such evidence is not "psychiatric evidence to negate specific intent" and should not be admitted. Otherwise, the insanity defense [will be] improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a "diminished responsibility" or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony. *Senate Report, supra* at 229, 1984 U.S.Code Cong. & Ad.News 3411.
>
> Evidence offered as "psychiatric evidence to negate specific intent" is admissible, however, when such evidence focuses on the defendant's specific state of mind at the time of the charged offense.

Spielvogel's proffered testimony went to his state of mind, not to some diminished responsibility or incapacity to form specific intent and was not an attempt to "back door" an insanity defense.

Spielvogel's counsel reserved opening statement until after the government rested. [1/22/2001 TR - 191] The morning following his opening statement he asked the district judge to revisit the ruling on the R&R. [1/23/2001 TR - 4] He referred to the psychiatric evidence as "really what is my only defense on behalf of Mr. Spielvogel . . . " [1/23/2001 TR - 4] Spielvogel reiterated his position that the intended testimony would be "within the law in the 11th Circuit announced in the *Cameron* case and confirmed in the *Westcott* case in which this Court was the trial judge." [1/23/2001 TR - 5]

Spielvogel proffered:

> Basically what Dr. Caddy will say is that Mr. Spielvogel had a mental condition that – that tends to show that he did not possess sufficient mens rea with regard to each of the counts in the indictment. Particularly what I'm speaking of is the fact it's the burden of the Government to show that Mr. Spielvogel acted willfully with regard to each of the crimes charged in the indictment. And as the Court is aware, willfully means that the act was committed voluntarily and purposely with the specific intent to do something which the law forbids . . .

[1/23/2001 TR - 5]

The district judge said he would consider that a proffer and carry it with the case. [1/23/2001 TR - 6] However, the district judge heard objection from the government and then stated:

> Well, the record, I think, is complete with respect to that in terms of the hearings before the magistrate judge, his report and recommendation and my order adopting that report . . . and that will continue to be the ruling of the Court unless I decide otherwise after having heard Dr. Spielvogel – Mr. Spielvogel testify.

[1/23/2001 TR - 7]

Spielvogel took the stand and in his testimony told the story that ended up causing him to be scored for obstruction – an incredible tale that had the effect of incriminating himself and exonerating his co-defendant, Dr. Pendergraft.[2] The government's position has consistently been that this testimony was perjury, agreed to by Spielvogel for Dr. Pendergraft's benefit. It certainly did not benefit Spielvogel – indeed it amounted to a concession of guilt.

In any event, at this point counsel for Spielvogel asked the Court after a recess to hear "a 30-second recitation of the testimony [Dr. Caddy] would present" and then if the Court were still unwilling to

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[2] Dr. Pendergraft later pled guilty to accessory after the fact to a false statement, based on this testimony, which Dr. Pendergraft confirmed in his testimony which came after Spielvogel. The government implied in cross examination that Dr. Pendergraft and Spielvogel conspired to have Spielvogel take the blame. [1/24/2001 TR - 229] [1/29/2001 TR - 303-304]

allow his testimony, he would be excused. [1/24/2001 TR - 148]

After just one question from the Court – which clearly only confused Dr. Caddy and resulted in confusion on the part of the district court[3] – the following exchange took place:

> [COURT] All right. You're asserting a defense of insanity in this case, Mr. Brodersen?
>
> [DEFENSE COUNSEL] I have not put the Government on notice or the Court on notice of that, Your Honor.
>
> [COURT] All right. Well, then, wait just a minute. What is it that you expect to call the doctor to address?
>
> [DEFENSE] Your Honor, I put the Government and the Court on notice that I intend to put – to present a defense involving Mr. Spielvogel's mental condition, in that his personality disorder, as Dr. Caddy has opined, was such that it has an effect on the jury's question of whether or not he willfully engaged in the crimes with which he is charged. And my understanding of *United States v. Cameron* is if the testimony of the psychiatrist or psychological expert is such that it would allow the jury to more clearly understand whether or not the defendant

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[3] [1/24/2001 TR - 149-150]

> acted willfully, *without the expert testifying that he acted willfully or not*, then it is admissible. That is the simple reason for Dr. Caddy's testimony.
>
> [COURT] Well, how does that differ from a diminished capacity purported defense that was dealt with in *Cameron*?
>
> [DEFENSE] Because it goes precisely to the – to negate mens rea or allow the jury to find a negation of mens rea, and it doesn't go to whether or not -- it doesn't go to explain or excuse or justify his conduct, but, rather – and it doesn't go to whether or not he had the ability to form mens rea; it simply goes to the issue of did he have the mens rea that the Government is required to prove beyond a reasonable doubt.
>
> [COURT] Well, if that's what he's going to testify to, it's expressly precluded by Rule 704(b).
>
> [DEFENSE] I understand 704(b) says that an expert cannot testify as to the ultimate issue in the case. . . .

[1/24/2001 TR - 150-151] [emphasis supplied]

After hearing argument from the government, the Court prohibited the testimony from Dr. Caddy:

> Well, I don't think we need to pursue it. Based on the magistrate's report and recommendation, which I previously adopted, the lack of the required notice under Rule 12.2, I think it is, *with respect to an insanity*

> *defense*, and in view of the provisions of Rule 704(b), with respect to the expression of opinion by an expert witness concerning the mental state or condition of the defendant at the time of the offense, as well as the point just made by Government counsel concerning its rights under Rule 16, I'm going to preclude the testimony by Dr. Caddy.

[1/24/2001 TR - 153]

With all due respect to the district judge, each of his conclusions was wrong. (1) His reliance upon the R&R, which the defense had filed timely objections to, without ever reviewing the record of that hearing, was constitutionally deficient. The procedure of adopting an R&R, the entire subject of which was proffered testimony, without ever reviewing that testimony, denied Spielvogel the *de novo* review which is constitutionally mandated to uphold referrals to magistrate judges; (2) The defense had provided timely notice of its intended expert testimony, and it did not intend to rely upon an insanity defense, therefore no notice of intent to rely upon insanity defense was required; (3) 704(b) had been expressly construed by the Eleventh Circuit to *permit* expert testimony tending to negate specific intent; and (4) The government had been provided a copy of Dr. Caddy's report prior to the preliminary hearing on admissibility and the government itself filed the report with the Court prior to the magistrate's hearing. [9/8/2000 TR - 14; 20; Docket 34]

Rule 704(b) of the Federal Rules of Evidence, as amended by the Insanity Defense Reform Act, provides as follows:

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The rule clearly shows that Congress appreciated the distinction between evidence negating specific intent and evidence supporting a finding of insanity. The rule itself maintains that distinction by prohibiting an expert witness testifying with respect to *either* the existence of a mental element of a crime *or* a defense based on a mental condition from stating an opinion on the ultimate issue. Second, implicit in the rule's exclusion of ultimate issue testimony is Congress' acknowledgment that expert testimony may otherwise be admissible either on the issue of specific intent or on the issue of insanity. The language of Rule 704(b) and its legislative history clearly show that Congress recognized that expert testimony negating the existence of specific intent may be offered in cases not involving an insanity defense. Senate Report 225 contains the following discussion highlighting this fact:

> [T]he rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven. The Committee has fashioned its Rule 704 provision to reach all such "ultimate" issues, *e.g.*, premeditation in a homicide case, or lack of predisposition in entrapment.

S.Rep. No. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3413.

Given that Rule 704(b) derived from the IDRA, it seems clear that the IDRA should not be interpreted as excluding expert testimony on the issue of specific intent. This was the holding of *Cameron*. Accordingly, based on *Cameron* and the legislative history, had the District Court been presented with the record, that is the transcript of the evidentiary hearing, the District Court would have allowed Spielvogel the right to present expert psychiatric testimony to negate proof of specific intent.[4]

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[4] *See also Annotation, Admissibility of Expert Testimony as to Whether Accused Had Specific Intent Necessary for Conviction*, 16 A.L.R. 4th 666; Harlow M. Huckabee, *Diminished Capacity Dilemma in the Federal System*, May 1991, 1991 Westlaw 330765; and Harlow M. Huckabee, *Evidence of Mental Disorder on Mens Rea: Constitutionality of Drawing the Line at the Insanity Defense*, 16 Pepperdine L. Rev. 573 (1989).

B. GOVERNMENT OPENED THE DOOR TO DR. CADDY

The error was compounded by the government's repeated and improper use of Dr. Caddy as a subject for cross examination of both Spielvogel and Dr. Pendergraft.

> Q [Government] And then there came a time when you decided to see a forensic psychologist to try to provide you a defense in this case; correct?
>
> A [Spielvogel] No, not to provide me a defense.
>
> Q You saw him for twelve and one-half hours; correct?
>
> A The first time, yes.
>
> Q And he generated a report and a conclusion from things that you told him; correct?
>
> A He generated a report.
>
> Q And you were here, in this courtroom, during hearings, trying to use that to get that report and his testimony admitted; correct?
>
> MR. ROSE [Defense counsel] Objection, Your Honor. It's not relevant; speculation; legal conclusion.
>
> MR. DEVEREAUX [Government] I don't know what all that was.

THE COURT Well, I'm uncertain about the relevance of this and whether or not it's overcome under 403, in any event, Mr. Devereaux.

MR. DEVEREAUX [Government] One more question, Your Honor, on that.

THE COURT Put it then.

Q You lied to Dr. Caddy when he's trying to put his report together, didn't you . . .

[1/24/2001 TR - 215-216]

This cross examination did not go on for just this one additional question, it continued for five more pages of transcript, ending with the following improper questions:

Q And so after hearing all the Government's evidence against you, you went to get your psychologist; correct?

A To reconcile and try to help me with the facts of this case.

Q And you knew that the phone call captured between 6:35 and 6:51 with Mr. Cretul calling you and canceling that planned meeting, you knew that there was no Alabama threat there; right?

A At that time, yes.

Q *So you had to come up with an alibi or an excuse or a story; true?*

A No.

> Q So this . . . *you weren't trying to trick Caddy into something, were you?*
>
> A No.

[1/24/2001 TR - 221] [emphasis supplied]

> Q When did you get help – I put that in quotes, "help," from Dr. Caddy versus just a medical, you know, opinion by a psychologist?
>
> . . .
>
> Q But you weren't going to Dr. Caddy to get some kind of help for, you know, like ongoing treatment, so you can deal with grief or anxiety or whatever, a psychiatric problem; you went there to get a forensic opinion for court?

[1/24/2001 TR - 227-228]

The government attorney wrapped this chapter of cross examination up by implying that Spielvogel had agreed to take the fall for Dr. Pendergraft – although there was no evidence whatsoever to support such an accusation:

> Q Do you know what it is to take the fall for somebody?
>
> A I've heard that statement, yes.
>
> Q What does that statement mean to you?
>
> A Somebody going to prison, and somebody else going free.

> Q Dr. Pendergraft started out paying for your attorney, didn't he?
>
> MR. ROSE [Defense counsel] Objection.
>
> THE COURT I'll sustain that objection, Mr. Devereaux.

[1/24/2001 TR - 229]

The government cross examined Spielvogel for two days. On the second day of cross examination the government continued to mine the Dr. Caddy issue. [1/25/2001 TR - 106-109] In doing so, the government referred to the Defendant as being "toast" after the government rested [1/25/2001 TR - 106] then falsely suggested to the jury that the reason Dr. Caddy had not testified was because Spielvogel had lied to him:

> Q You lied to Mr. Cretul – excuse me, to Dr. Caddy, and then he couldn't come in to give you corroboration on your story for this case; right?
>
> MR. BRODERSEN [Defense counsel] Objection, Your Honor. Dr. Caddy was –
>
> THE COURT Sustained.
>
> Q When you went to Dr. Caddy, you already had all the discovery from the United States; correct?
>
> A I personally didn't review everything at that time.
>
> Q And then you – there came a point when you learned that Dr. Caddy was not going to

> be able to come in here and support your story; correct?
>
> MR. BRODERSEN [Defense counsel] Objection, Your Honor, interposing Dr. Caddy's purpose, and counsel knows that.
>
> THE COURT I'll sustain that.

[1/25/2001 TR - 108]

Finally, when cross examining Dr. Pendergraft on his knowledge of Dr. Caddy's report, counsel for Spielvogel objected:

> Your Honor, I'm going to object. The doctor [Dr. Pendergraft, the codefendant on the witness stand, not Dr. Caddy, the psychologist] has already indicated he hasn't read the report [the Caddy report the Court had excluded]. If Mr. Devereaux uses bits and pieces of the report without the entire report coming into evidence, that's improper.
>
> THE COURT This is a different objection. I'll overrule the objection presently.[5]

[1/29/2001 TR - 288-289]

This was Spielvogel's only theory of defense, and to take this defense from him on this record, while allowing the government to cross examine on it, amounted to a denial of fundamental due process and

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[5] The government was allowed to argue this in closing as well. [*See e.g.* 1/30/2001 TR - 483*ff*]

reversible error. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Whether this Court agrees or not that Dr. Caddy's testimony would have otherwise been admissible, the government opened the door to Spielvogel's use of Dr. Caddy's testimony by its improper cross examination noted above. Even were Dr. Caddy's testimony otherwise inadmissible under the Insanity Defense Reform Act, which of course we dispute, this improper cross examination clearly opened the door to Dr. Caddy's testimony to rebut the improper implications of the government's cross examination. *United States v. O'Keefe*, 461 F.3d 1338, 1348-1349 (11th Cir.2006) (evidence admissible because opposing counsel opened door); *United States v. Hall*, 653 F.2d 1002, 1006 (5th Cir. Unit A Aug.1981) ("The underlying rationale [of rebuttal evidence] is that when the defendant has opened the door to a line of testimony by presenting evidence thereon, he cannot object to the prosecution's accepting the challenge and attempting to rebut the proposition asserted." Cited in *United States v. Frazier*, 387 F.3d 1244, 1270 (11th Cir.2004)).

Once the government opened the door by its cross examination, Spielvogel was then entitled to introduce evidence of Dr. Caddy's report as well as Dr. Caddy's testimony. Brodersen was ineffective for failing to argue this at trial or on appeal.

Had Brodersen preserved and presented the arguments set forth above, this Court cannot be

confident beyond a reasonable doubt the outcome of the trial or appeal would have been the same. Brodersen's failure constitutes deficient performance because it was below the minimum standard of performance required of counsel under the Sixth Amendment. Because Spielvogel was prejudiced by the deficient performance, Spielvogel is entitled to have his conviction reversed.

II. WHETHER *DE NOVO* REVIEW OF THE RECORD OF A MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A CRIMINAL CASE ON THE QUESTION OF THE ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL IS CONSTITUTIONALLY MANDATED AND REQUIRES THE DISTRICT COURT TO REVIEW A TRANSCRIPT OF AN EVIDENTIARY HEARING CONDUCTED BY THE MAGISTRATE JUDGE, WHICH WAS THE BASIS FOR THE MAGISTRATE'S RECOMMENDATION.

Aside from the merits of Spielvogel's position under Rule 704, the District Court constitutionally erred when it adopted the Magistrate's R&R, after objections had been made, without reviewing a transcript of the hearing.

> 28 U.S.C. § 636(b)(1) requires a district court judge to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or

recommendations to which objection is made." The judge may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id. The judge is afforded considerable discretion in determining what reliance he or she may place upon the magistrate judge's findings and recommendations. See *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) ("in providing for a '*de novo* determination' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations."). This court has stated:

> In order to conduct a *de novo* review a court "should make an independent determination of the issues . . . ; [it] 'is not to give any special weight to the [prior] determination'. . . ." "The district judge is free to follow [a magistrate judge's recommendation] or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew."

Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458, 1464 (10th Cir.1988) (citations omitted). *We have also noted that "an appellate court must be satisfied that a district judge has exercised his nondelegable authority by considering the actual*

> *testimony*, and not merely by reviewing the magistrate's report and recommendations." *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir.1987) (per curiam) (quoting *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir.1981) (per curiam)).

Andrews v. Deland, 943 F.2d 1162, 1170 (10th Cir.1991).

The law of the Eleventh Circuit appeared to prohibit a district judge ruling on an objected to R&R without reading the transcript of the proceeding before the magistrate:

> *The sole issue which we consider on appeal, is whether the record must reflect with certainty that a trial judge actually read the transcript of the hearing before a magistrate on a motion to suppress, before adopting the magistrate's recommendation. We hold that it must.*
>
> . . .
>
> In *United States v. Marshall*, 609 F.2d 152 (5th Cir.1980), this court considered the question of whether a district court had erred in denying a motion to suppress after a magistrate had conducted a hearing and recommended granting the motion, without consulting the transcript of the hearing. Judge Hill, writing for this court, concluded:
>
> > In this circuit a district judge who reviews the record of the hearing before the magistrate and adopts

> the magistrate's recommendations need not conduct a new hearing. . . . (Nevertheless,) *the district judge err(s) in rejecting the recommendation of the magistrate without at least consulting the transcript of the hearing before the magistrate.*

Id. at 155.

Without reaching the merits of the constitutional issues raised by appellant regarding an alleged illegal search and use of the "Drug Courier Profile," *we are disturbed by the uncertainty reflected in the record as to whether the trial court actually read the transcript of the hearing before the magistrate.*

In *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976), one of the earliest Supreme Court cases interpreting § 636(b) of the United States Magistrates Act, 28 U.S.C.A. §§ 631-639, the Supreme Court discussed the abuses which could arise under a system of referral to judges not appointed pursuant to Article III of the Constitution. The committee reports indicated that Congress had considered and dealt with the problem in two ways, first by limiting referral to cases "not inconsistent with the Constitution," and second by limiting the magistrate's authority in cases referred pursuant to § 636(b). During one of the hearings Senator Tydings testified, "(a) district judge would retain ultimate responsibility for decision making in every

instance in which a magistrate might exercise additional duties jurisdiction." (House Hearing 573). From these discussions, the Supreme Court concluded:

> The magistrate may do no more than propose a recommendation, and neither § 636(b) nor the General Order gives such recommendation presumptive weight. . . . The authority and the responsibility to make an informed, final determination, we emphasize, remains with the judge.

Mathews v. Weber, 423 U.S. at 270-71, 96 S.Ct. at 554.

In the instant case, we have considered the record on appeal in light of *Mathews*, and are left with uncertainty as to whether the district court read the transcript of the hearing on the motion to suppress. *The constitutional safeguards, as established by Congress and interpreted by the courts, are such that an appellate court must be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely by reviewing the magistrate's report and recommendations.*

In the instant case, the trial court's order denying the motion to suppress nowhere states that a reading of the transcript informed its decision . . . Appellant now argues that this conversation suggests that the trial court failed to consider the

> transcript of the hearing before the magistrate, and therefore the trial court unconstitutionally relied upon the magistrate's findings and recommendation. While we cannot agree that the conversation is dispositive of the factual question as to whether the transcript was properly considered, we do agree that the remarks are sufficiently ambiguous to cause us to remand in order to be certain that the testimony was considered.
>
> The authority to grant or deny a motion to suppress must be retained by a judge appointed pursuant to Article III of the Constitution. As the Supreme Court in *Mathews* put it, "the magistrate acts 'under the supervision of the district judges' when he accepts a referral, and that authority for making final decisions remains at all times with the district judge." When the record does not disclose that the judge exercised that supervision and authority, adherence to the rule laid down in *Mathews* is an open question which must be resolved.

United States v. Elsoffer, 644 F.2d 357, 358-359 (5th Cir.1981).

The district court erred in adopting the R&R to which Spielvogel had objected, without reviewing a transcript of the evidentiary hearing that was the basis for the R&R. The R&R itself stated that it was recommending that the evidence be excluded "for the reasons explained in open court . . . " as well as the

reasons set forth in the R&R. The question was whether the proffered testimony was admissible or not. This issue could not be determined under the required *de novo* review standard, without the district court reading the record to see what the testimony was.

Under the Federal Magistrate's Act (the "Act"), Congress vested Article III judges with the power to authorize a United States Magistrate Judge to conduct evidentiary hearings. The relevant portion of this act is found at 28 U.S.C. § 636. A district court judge may designate a United States Magistrate Judge to conduct hearings, including evidentiary hearings, in order to submit proposed findings of fact and recommendations (*i.e.,* the R&R). 28 U.S.C. § 636(b)(1)(B). Within ten days after being served with a copy of the R&R, any party may file written objections to the proposed findings and recommendations. *Id.* Section 636(b)(1) also states that a judge of the court shall make a *de novo* determination of those portions of the R&R to which objection is made. 28 U.S.C. § 636(b)(1).

In *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), this Court upheld the constitutionality of this provision of the Act and in doing so this Court found that Congress had adequately protected the Act against an Article III constitutional challenge by subjecting the Magistrate Judge's proposed findings and recommendations to *de novo* determination by the Article III district judge,

who then exercises ultimate authority to issue an appropriate order. 447 U.S. at 681, 100 S.Ct. at 2415.

In *Jeffrey S. v. State Board of Education of State of Georgia,* 896 F.2d 507, 512 (11th Cir.1990), this Court stated that the *de novo* review requirement is essential to the constitutionality of § 636. The Court further stated that § 636(b)(1)'s nonconsensual reference is saved from constitutional infirmity by the retention in the Article III judge of the ultimate adjudicatory power, to be exercised after assistance from and upon the recommendation of the Magistrate Judge. *Id.* at 512-513 citing *Hall v. Sharpe,* 812 F.2d 644, 647 (11th Cir.1987).

Without obtaining and reviewing a transcript of the Magistrate Judge's evidentiary hearing, the district court could not conduct *de novo* review. Spielvogel never received the constitutionally required *de novo* review, because the district judge adopted the R&R without reviewing a transcript of the evidentiary hearing.

This procedure was tantamount to delegating to the magistrate judge the authority to decide the question, and as such was in violation of Article III of the Constitution.

The District Court erred in denying Spielvogel relief on this ground in his § 2255 petition. Certiorari should be granted to establish the principle that Article III requires *de novo* review of a Magistrate Judge's R&Rs and that such *de novo* review requires the district judge review a transcript of any

evidentiary hearing before adopting or rejecting an R&R.

CONCLUSION

Based on the foregoing arguments, Petitioner Spielvogel respectfully requests this Honorable Court grant certiorari to decide the above questions.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15311-E

MICHAEL SPIELVOGEL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Jan. 9, 2009)

ORDER:

Michael Spielvogel has filed a notice of appeal, which we construe as a motion for a certificate of appealability. To merit a certificate of appealability, Spielvogel must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because Spielvogel has failed to satisfy

the requirements of *Slack*'s test, his construed motion for a certificate of appealability is DENIED.

/s/ Stanley Marcus
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES
OF AMERICA,

vs.

MICHAEL SPIELVOGEL,

Defendant/Petitioner

Case No.
5:00-cr-21-Oc-32GRJ
5:06-cv-154-Oc-32GRJ

ORDER[1]

(Filed Oct. 8, 2008)

This case is before the Court on petitioner Michael Spielvogel's Notice of Appeal (Doc. 18), from which the Court construes an Application for a Certificate of Appealability (Doc. 19). On April 24, 1996, the President signed into law amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Federal Rule of Appellate Procedure 22, and 21 U.S.C. § 848(q). As a result, this Court should grant an application for a certificate of appealability only if the petitioner makes a substantial showing of the denial of a constitutional right. To make this substantial showing, a petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court

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[1] Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it is intended to decide the motion addressed herein and is not intended for official publication or to serve as precedent.

could resolve the issues [differently]." *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983) (citation omitted). In addition, a petitioner could show "the questions are adequate to deserve encouragement to proceed further." *Id.*

Specifically, where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *Hernandez v. Johnson,* 213 F.3d 243, 248 (5th Cir.), *cert. denied,* 531 U.S. 966 (2000). When the district court has rejected a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack,* 529 U.S. at 484; *Franklin v. Hightower,* 215 F.3d 1196, 1199 (11th Cir. 2000) (per curiam), *cert. denied,* 532 U.S. 1009 (2001). Here, based on the Court's review of the motions filed, the Orders rendered and the issues raised in the Application for Certificate of Appealability, Spielvogel has failed to satisfy the applicable *Slack* test. Accordingly, it is hereby

ORDERED:

Spielvogel's Application for Certificate of Appealability (Doc. 19) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of October, 2008.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:

Mark B. Devereaux, Esq. (AUSA-JAx)
William Mallory Kent, Esq.
Frederick T. Lowe, Esq.
Michael R. Spielvogel (defendant/petitioner)
Clerk of Court for the Eleventh Circuit Court of Appeals

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA	Case No. 5:00-cr-21-Oc-32GRJ
vs.	Case No.
MICHAEL SPIELVOGEL	5:06-cv-154-Oc-32GRJ

ORDER[1]

These cases are before the Court on Michael Spielvogel's Request to Amend his Petition Filed Pursuant to 28 U.S.C. § 2255 (Doc. 15) filed in his civil case, 5:06-cv-154-Oc-32GRJ, and his original Motion to Vacate Petition for Writ of Habeas Corpus, filed as Doc. 1 in his civil case, 5:06-cv-154-Oc-32GRJ and Doc. 361 in his criminal case, 5:00-cr-21-Oc-32GRJ.[2] The Court is familiar with the law and facts of this case and, having reviewed Spielvogel's papers, has determined to rule without waiting for a response from the government[3] so that Spielvogel can, if he so

[1] Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

[2] Hereinafter, references are to the documents filed in the civil case only unless otherwise specified.

[3] Some of the government's filings include limited analysis of its views on the issues raised. *See* Docs. 367, 371, 377, 405

(Continued on following page)

wishes, take an immediate appeal of all remaining issues in this case. Furthermore, in accordance with the rules governing Section 2255 petitions, the Court has determined that an evidentiary hearing is not needed to decide this case.

In his original motion (Doc. 1), Spielvogel, who has been represented by counsel throughout these proceedings, raised five separate grounds for relief. On October 25, 2006, the Court entered an Order granting relief as to Ground V (which permitted Spielvogel to seek a belated direct appeal as to two counts of his conviction and sentence) and denying without prejudice relief as to all other grounds, finding them to be premature in light of the direct appeal. *See* Order, Doc. 14.[4] Thus, from his original petition, Grounds I-IV remain ripe for decision. With his motion to amend (Doc. 15), which the Court now grants, Spielvogel filed a proposed First Amendment

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filed in the criminal case, 5:00-cr-21-Oc-32GRJ. The Court has considered these filings in rendering this decision.

[4] The Court's October 25, 2006 Order (Doc. 14, pp. 2-7) contains a more complete recitation of the relevant procedural history of this case, which is not repeated here. Additional case history is discussed in several Eleventh Circuit opinions. *See United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002); *United States v. Spielvogel*, No. 03-13135 (11th Cir. Mar. 3, 2004) (filed in the criminal case, 5:00-cr-21-Oc-32GRJ, as Doc. 317); *United States v. Spielvogel*, No. 03-13135 (11th Cir. Mar. 15, 2005) (filed in the criminal case, 5:00-cr-21-Oc-32GRJ, as Doc. 351); *United States v. Spielvogel*, No. 06-16000 (11th Cir. Feb. 7, 2008) (filed in the criminal case, 5:00-cr-21-Oc-32GRJ, as Doc. 401).

to his original petition, in which he raises three additional grounds for relief, Supplemental Grounds I, II, and III (hereinafter, "Supp. Ground ___"). All seven grounds are addressed below.[5]

I. Legal Standard

Title 28, United States Code, Section 2255, allows attack on a sentence on only four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentence was imposed without jurisdiction; (3) the sentence was imposed in excess of the maximum authorized by law; (4) the sentence is otherwise subject to collateral attack. Only jurisdictional claims, constitutional claims, and claims of error so fundamental as to have resulted in a complete miscarriage of justice warrant relief on collateral attack. *United States v. Addonizio,* 442 U.S. 178, 184-86 (1979).

II. Analysis

A. Ground I (sufficiency of evidence to support Counts IV and V)

In Ground I, Spielvogel contends that the government failed to put on sufficient evidence to

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[5] A successful § 2255 motion which secures a belated appeal "does not render subsequent collateral proceedings 'second or successive.'" *McIver v. United States,* 307 F.3d 1327, 1332 (11th Cir. 2002).

support conviction on Counts IV and V of the indictment (which charged Spielvogel with committing perjury by filing a false affidavit and making false statements to the FBI) because testimony from Larry Cretul, the person about whom Spielvogel allegedly made the false statements, actually supported the truth of Spielvogel's allegedly false statements. However, the Eleventh Circuit previously rejected Spielvogel's argument that "insufficient evidence existed to support his conviction for making false statements to the FBI," holding that the Court had "already affirmed Spielvogel's convictions for filing a false affidavit and making false statements to the FBI. . . ." *United States v. Spielvogel,* No. 03-13135 (11th Cir. Mar. 3, 2004) (filed in criminal case 5:00-cr-21-Oc-32GRJ as Doc. 317) at 3 (citing opinion in *United States v. Pendergraft,* 297 F.3d 1198, 1212-13 (11th Cir. 2002). Once a claim has been raised and adversely decided on direct appeal, it cannot be relitigated in a collateral attack under § 2255. *United States v. Nyhuis,* 211 F.3d 1340, 1343 (11th Cir. 2000).

B. Ground II (prejudicial spill-over from Counts I, II, and III)

In Ground II, Spielvogel contends that the evidence from Counts I, II and III (the convictions of which were reversed on appeal) prejudicially tainted the trial and his resulting conviction on Counts IV and V. Here too, the Court finds this issue has been considered and rejected on direct appeal. *See United States v. Spielvogel,* No. 06-16000 (11th Cir. Feb. 7,

2008) (filed in criminal case 5:00-cr-21-Oc-32GRJ as Doc. 401) at 3-4 (holding as "meritless" the argument that Spielvogel's convictions on Counts Four and Five were tainted by evidence of crimes not supported by facts of the case, because that conduct established motive, which was relevant).

C. Ground III and Supp. Ground III (ineffective assistance of counsel in failing to preserve *Apprendi* claim)

In both his original Ground III and his Supplemental Ground III, Spielvogel argues that he received ineffective assistance of counsel when his lawyer (a predecessor to his current counsel) failed to preserve an *Apprendi* argument either before this Court or on appeal. However, with binding Circuit precedent at the time holding that no *Apprendi* claim was available, counsel cannot be held to have rendered ineffective assistance for having failed to raise this argument. *United States v. Levy,* 391 F.3d 1327, 1334 n.3 (11th Cir. 2004) ("An attorney's failure to anticipate a change in the law does not constitute ineffective assistance of counsel."); *United States v. Ardley,* 273 F.3d 991, 992-93 (11th Cir. 2001).

D. Ground IV and Supp. Ground II (obstruction enhancement and ineffective assistance of counsel in failing to object to obstruction enhancement)

In these two grounds, Spielvogel argues both that the testimony used to support his obstruction

enhancement was not false or material, and that his counsel was ineffective both at resentencing and on appeal for failing to make the correct objection to the application of the guideline obstruction enhancement. However, the Eleventh Circuit considered and rejected the claim that the district court erred in applying this enhancement. *See United States v. Spielvogel,* No. 03-13135 (11th Cir. Mar. 3, 2004) (filed in criminal case 5:00-cr-21-Oc-32GRJ as Doc. 317) at 4-6 (holding that district court did not err at resentencing in enhancing sentence under USSG § 3C1.1 for obstruction of justice). Accordingly, there can be no claim that counsel rendered ineffective assistance in failing to make appropriate objections to this enhancement.

E. Supp. Ground I (ineffective assistance related to Dr. Caddy)

Here, Spielvogel raises several errors all related to his lawyer's failed efforts to secure for trial the testimony of Dr. Glenn Caddy, a forensic psychiatrist who examined Spielvogel and was offered by the defense as an expert witness to support Spielvogel's "diminished capacity" defense.

Back in August 2000, upon being advised that the defense intended to present trial testimony from Dr. Caddy, the government filed a motion in limine to exclude his testimony. The motion was referred to the Magistrate Judge who conducted an evidentiary hearing and issued a Report and Recommendation,

recommending that Dr. Caddy's testimony be excluded. *See* Report and Recommendation, Doc. 44 (filed in criminal case, 5:00-cr-21-Oc-32GRJ). At issue was whether the defense could introduce testimony from Dr. Caddy to support the contention that Spielvogel was unable to form the specific intent to commit the crimes charged in the indictment because of his diminished mental capacity. Spielvogel was not, however, offering an insanity defense and Dr. Caddy was not offered as a Rule 12.2(b) expert. In a well-reasoned and thorough opinion, United States Magistrate Judge Gary R. Jones recommended that Dr. Caddy's testimony be excluded as not relevant to the *mens rea* issue. In arriving at this determination, Judge Jones recounted much of the testimony received from Dr. Caddy at the hearing, and explained why it failed to meet the necessary standard. Spielvogel, through counsel, filed objections to the Report and Recommendation,[6] which the District Judge overruled, adopting the Report and Recommendation. No transcript of the evidentiary hearing had been prepared at the time the Court issued its ruling.

At trial, Spielvogel's counsel twice urged the Court to revisit the issue of the admissibility of Dr. Caddy's testimony and, upon hearing argument and proffers on both occasions, those requests were denied

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[6] In his supplemental § 2255 motion, Spielvogel faults his counsel for failing to file objections. The objections are of record at Doc. 49 in the criminal case, 5:00-cr-21-Oc-32GRJ.

as well. Later, when the government cross-examined Spielvogel and questioned him about Dr. Caddy, Spielvogel's counsel objected but did not ask the Court to again reconsider permitting Dr. Caddy to testify. Although the admissibility of Dr. Caddy's testimony was an issue raised by Spielvogel through counsel on his first direct appeal, he did not order the transcript of the evidentiary hearing before the Magistrate Judge.

In Supplemental Ground I, Spielvogel now argues that his counsel rendered ineffective assistance by (a) failing to obtain the transcript of the evidentiary hearing and insist that the District Judge conduct a de novo review with the assistance of the transcript; (b) failing to properly object when the government "opened the door" to the admission of Dr. Caddy's testimony; (c) failing to present the transcript as part of the record on appeal and failing to argue on appeal that the government had "opened the door" to his testimony; (d) and failing to effectively argue on appeal that the District Court's exclusion of Dr. Caddy's testimony was error.

Upon review, the Court finds that none of these issues are meritorious. First, as to the failure to obtain a transcript, any error is harmless as the focus of the parties' arguments and the Court's ruling (and even the argument in the § 2255 petition) centered on the admissibility of psychological testimony bearing on specific intent, rather than on challenges regarding the content of Dr. Caddy's testimony itself. Moreover, the crux of Dr. Caddy's testimony was

recounted in the Report and Recommendation and by the parties in the briefs they submitted to the Magistrate Judge, which were independently reviewed by the District Judge. Second, as to the failure to object that the government had "opened the door" to Dr. Caddy's testimony, the District Judge had at that point *twice* revisited and rejected Spielvogel's counsel's request to permit Dr. Caddy to testify. Spielvogel's counsel's decision to object to the government's cross-examination, without specifically asking the Court to reconsider for a third time its earlier ruling to exclude the evidence was not deficient. *See Strickland v. Washington,* 466 U.S. 668, 688, 691-92 (1984) (setting forth two-part standard for establishing ineffective assistance claim). Third, failure to raise these same points on appeal is similarly not deficient performance. Neither was counsel's alleged failure to more effectively argue that the exclusion of Dr. Caddy's testimony was error. Spielvogel's counsel did raise this as an issue on appeal and the Eleventh Circuit considered and rejected his argument on the merits, giving considerable treatment to the point (albeit in a footnote). *See Penderaraft,* 297 F.3d at 1212, n.10. *See also, United States v. Spielvogel,* No. 06-16000 (11th Cir. Feb. 7, 2008) (filed in criminal case 5:00-cr-21-Oc-32GRJ as Doc. 401) at 3 (declining to consider on belated appeal that district court abused discretion in excluding Dr. Caddy's testimony because it was addressed on the merits in the first appeal). Moreover, even assuming deficient performance, there was

no cognizable prejudice to Spielvogel by the exclusion of Dr. Caddy's testimony.

III. Conclusion

Because the Court finds none of the remaining grounds raised in Spielvogel's original petition[7] and none of the grounds raised in his supplement to the petition provide any basis for relief, it is accordingly hereby

ORDERED:

Michael Spielvogel's Motion under 28 U.S.C. § 2255 to Vacate and Set Aside Defendant's Judgment of Conviction and Sentence (Doc. 361 in 5:00-cr-21-Oc-32GRJ and Doc. 1 in 5:06-cv-154-Oc-32GRJ), as amended pursuant to his Motion to Amend (Doc. 15 in 5:06-cv-154-Oc-32GRJ), is **DENIED** and the Petition is **DISMISSED WITH PREJUDICE**. The Clerk shall enter judgment in favor of the United States and against Michael Spielvogel, and close the file.

DONE AND ORDERED at Jacksonville, Florida this 15th day of July, 2008.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

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[7] As noted above, in an earlier Order, the Court granted relief as to Ground V which entitled Spielvogel to take a belated appeal (which he eventually lost). *See* Docs. 379.

s.
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